DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	DATE FILED: March 5, 2015 10:43 AM CASE NUMBER: 2014CV31358 ▲ **COURT USE ONLY** ▲
GERALD ROME, Acting Securities Commissioner for the State of Colorado *Plaintiff* v. **RICHARD ROOP,** and **BOTTOM LINE RESULTS, INC.** *Defendants*	Case Number: 2014 CV 31358 Courtroom: 259
ORDER	

THIS MATTER comes before the Court on a Motion for Partial Summary Judgment filed on December 15, 2014, by Plaintiff Gerald Rome, acting Securities Commissioner for the State of Colorado ("Commissioner"). Defendants Richard Roop ("Defendant Roop") and Bottom Line Results, Inc. ("BLR") (collectively, the "Defendants") filed a Response on January 14, 2015. Defendants also filed a Cross-Motion for Partial Summary Judgment ("Cross-Motion") on January 14, 2015. The Commissioner filed a Reply in Support of his Motion on January 28, 2015. Plaintiff filed a Response to Defendants' Cross-Motion on February 4, 2015. The Court has reviewed the Motion, the Cross-Motion, the pleadings in support and opposition, the case file and all relevant authority, and, being fully informed, finds and orders as follows:

BACKGROUND AND UNDISPUTED FACTS

This matter arises out of a series of real estate transactions executed by Defendants. BLR is a Delaware corporation that operates and conducts real estate investment businesses in Colorado. Defendant Roop is the acting President of BLR. The Defendants' primary business involves the acquisition, renovation, and resale of homes through alternative financing options.

Among the alternative financing options offered to investors is Defendants' "Private Lending Program."

Through the Private Lending Program, the Defendants finance real estate transactions by obtaining funds from independent third party investors who are solicited through various advertisement channels. Individuals who invest with the Defendants receive a deed of trust and a promissory note tied to an investment property. These instruments serve as collateral for their investments and promise a certain rate of return, usually between 7% and 10% annually, dependent on whether investor monies are used to secure a mortgage in first or junior lien position. Defendants also offer investors the option to invest in the Private Lending Program through self-directed IRA accounts. In order to offer this option, Defendants work with an Ohio-based trust company, Equity Trust Company ("Equity Trust").

The terms of these private loans vary from two to five years and allow investors to elect whether they receive payments of interest monthly, or allow the interest to accrue until the end of the loan term. Defendants typically provide a note Payment Schedule or similar document that reflects payments and returns. According to Defendants' marketing materials, private investor money is used to fund the purchase of property, raise money to repair, maintain, and occupy those properties, and cover other costs associated with buying and selling real estate. Once Defendants acquire a property with funding from investor money, they generally place the property in a land trust to take title to the property and name Defendant Roop as trustee.

I. Defendants' Licensure under the Colorado Securities Act

BLR became a licensed mortgage broker-dealer under the Colorado Securities Act, Colo. Rev. Stat. § 11-51-101 ("the Act"), on March 11, 1996. Defendant Roop became a licensed mortgage sales representative under the Act on March 11, 1996. On July 2, 2012, the Colorado

Securities Commissioner summarily suspended the licenses of both BLR and Defendant Roop based upon their refusal to provide records and documents in response to a request made pursuant to Colo. Rev. Stat. § 11-51-409(2). Following Defendants' failure to file an answer in the subsequent revocation proceedings before the Office of Administrative Courts, the Commissioner revoked the licenses of both BLR and Defendant Roop effective December 18, 2012.

II. The Yampa Property

In April 2013, through their Private Lender Program, Defendants acquired financing to purchase a property at 2724 Yampa Street, Colorado 80909 ("Yampa Property"). On April 5, 2013, Defendants executed a Loan Agreement with investor company Strategic Funding Group, LLC ("SFG") wherein SFG provided Defendants with a private loan in the amount of $65,000. Defendants placed the property in a land trust ("Yampa Property Trust") and named Defendant Roop as trustee. On April 5, 2013, Defendant Roop, in his capacity as trustee of the Yampa Property Trust, executed a promissory note and deed of trust to SFG as collateral for the private loan.

In September 2013, Defendants received two separate investments from Mr. Eric Wales totaling $25,000 through the self-directed IRA investment option. On September 25, 2013, Defendant Roop, individually and in his capacity as trustee for the Yampa Property Trust, executed two promissory notes and deeds of trust naming the Yampa Property as collateral for each of Mr. Wales' private loans. Each of these instruments named Equity Trust as the lender and custodian for the benefit of Mr. Wales' IRA.

III. Motion and Cross Motion for Partial Summary Judgment

On April 3, 2014, the Commissioner filed suit against Defendants alleging violations of the Act including the offer or sale of unregistered securities, unlicensed activity, and securities fraud. Specifically, the Commissioner alleges that Defendants have engaged in the fraudulent offer and sale of securities in the form of promissory notes, failed to make numerous material investment disclosures to investors, and paid returns to older investors with newer investor funds. These violations, according to the Commissioner, have caused significant injury to BLR investors and have the potential to inflict more damage in the future. The Commissioner filed his Partial Motion for Summary Judgment ("Motion") on December 15, 2014, seeking summary judgment on his First and Second Claims for Relief. Defendants filed a Cross Motion for Partial Summary Judgment ("Cross-Motion") on January 14, 2015, also seeking summary judgment on Plaintiff's First and Second Claims for Relief.

STANDARD OF REVIEW

Summary judgment is appropriate when, based on the pleadings, no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense associated with trial when, as a matter of law, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). The nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts, and all doubts are resolved against the moving party. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225-26 (Colo. 2000).

A party may move for summary judgment on an issue it would not bear the burden of proof upon at trial. *Casey v. Christie Lodge Owners Ass'n, Inc.*, 923 P.2d 365, 366 (Colo. App.

1996). In such an instance, the burden is on the moving party to establish the "nonexistence of a genuine issue of material fact." *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991) (citing *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987)). This burden may be satisfied by "demonstrating that there is an absence of evidence in the record to support the nonmoving party's case." *Id*. "An affirmative showing of specific facts, un-contradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists." *Civil Serv. Comm'n*, 812 P.2d at 649 (citing *Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 991 (Colo. 1968)).

ANALYSIS

I. Defendants have Offered and Sold Unregistered Securities in Violation of C.R.S. § 11-51-301

In his Motion, the Commissioner argues that the undisputed material facts show that promissory note investments offered and sold by the Defendants to investors in Colorado are "securities" as contemplated by Colo. Rev. Stat. § 11-51-201(17). The Commissioner further contends that the undisputed facts prove that Defendants sold or offered to sell unregistered securities by an unlicensed person in violation of Colo. Rev. Stat.§ 11-51-301.

Defendants have admitted that the promissory notes in question are securities under the Act. Additionally, Defendants have admitted that the investments/promissory notes they provided to investors were not registered with the Commissioner, and that a notice of exemption was not filed at the time of execution. However, Defendants assert that the promissory notes in question fall within an exemption found in Colo. Rev. Stat. § 11-51-308(1)(e) ("the Exemption"), which exempts certain specified securities from registration requirements if they are sold as a unit or a group.

Defendants contend that the Exemption specifically exempts a promissory note secured by a deed of trust from registration. Defendants claim that the promissory notes executed by BLR were each secured by individual deeds of trust and thus constituted the sale of a unit to each purchaser. Defendants state that there was no pooling of interests from various purchasers into each note, and that each purchaser received a specific security instrument with no reference to separate investor liens. Further, Defendants claim that investor rights were not commingled within each security, except for the fact that the same property was used as collateral. Therefore, according to Defendants, their actions qualify for the Exemption since the investments were each sold as a unit.

The Commissioner argues that Defendants do not qualify for the Exemption because they routinely sell properties that are not offered and sold as a unit. Specifically, the Commissioner contends that the Defendants frequently execute multiple promissory notes on a single property (as was done in the Yampa Property transactions), thereby fractionalizing the property interests between different investors and/or investments made by a single investor. According to the Commissioner, the Exemption is intended to govern single mortgage transactions – such as what a bank might provide in a purchase-loan on a house, not multiple distinct transactions collateralized by a single property interest.

"It is unlawful for any person to offer to sell or sell any security in this state unless it is registered under this article or unless the security or transaction is exempted under sections 11-51-307, 11-51-308, or 11-51-309." Colo. Rev. Stat. § 11-51-301. The Act details the following exemption:

> (e) Any transaction in a bond or other evidence of indebtedness secured by a mortgage, security interest, or deed of trust or by an agreement for the sale of real estate or chattels, *if the entire mortgage, security interest, deed of trust, or agreement together*

> *with all the bonds or other evidences of indebtedness secured thereby is offered and sold as a unit.*

Colo. Rev. Stat. § 11-51-308(1)(e) (2014). In order to determine whether the Defendants qualify for the Exemption in the instant case, the Court must determine whether multiple promissory notes, which are sold in different transactions, to various investors, and collateralized by the same property, can constitute a sale of securities "as a unit." This is a question of first impression in Colorado.

A. The Exemption Only Applies to a Single Transaction Wherein All Debt Instruments Collateralized by a Single Property Interest are Offered and Sold Together

Statutory interpretation is a question of law. *Fischbach v. Holzberlein*, 215 P.3d 407, 409 (Colo. App. 2009). "Under the basic principles of statutory interpretation, we first determine whether the statutory language has a plain and unambiguous meaning." *Id.* The language at issue must be read in the context of the entire statutory scheme so as to give "consistent, harmonious, and sensible effect to all parts of a statute." *Jefferson Bd. Of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) (citing *People v. Dist. Ct.*, 713 P.2d 918, 921 (Colo. 1986)).

The purpose of the Colorado Securities Act is "to protect investors and maintain public confidence in securities markets while avoiding unreasonable burdens on participants in capital markets." H.B. 90-1222, 57th Leg., Reg. Sess. (Co. 1990). As a primary means of accomplishing this goal, the Act requires the disclosure of important financial information through the registration of securities. This information enables investors to make informed decisions about whether to purchase a company's securities.

In drafting the Exemption, the Colorado Legislature relied on section 402 of the Uniform Securities Act of 1985 ("Section 402"). Colo. Rev. Stat. § 11-51-308(1)(e) (2014) editor's and revisor's notes. The Exemption begins by identifying "[a]ny transaction in a bond or other

evidence of indebtedness." *Id.* According to the official comments of Section 402, "[t]he term 'bond' includes a promissory note and other forms of indebtedness." UNIF. SECURITIES ACT § 402 (1988). Next, the Exemption identifies only such bonds or evidence of indebtedness that are "secured by a mortgage, security interest, or deed of trust…." Colo. Rev. Stat. § 11-51-308(1)(e). In this context, the Exemption applies to transactions where property interests (mortgages, security interests, deeds of trust) are used to secure the payment of a debt (bonds, promissory notes, or other evidence of indebtedness).

Next, the Exemption provides that such a transaction is only exempted from registration "if the *entire* mortgage, security interest, deed of trust, or agreement" in addition to "all" other bonds, promissory notes, or evidences of indebtedness "secured thereby" are "offered and sold as a unit." *Id.* In interpreting this language, the official comment to Section 402 provides some guidance. "The key restriction here is that the debt instrument and the mortgage be both offered and sold as a unit. If that is done, it does not matter to whom the entire unit is sold." UNIF. SECURITIES ACT § 402(7) (1988) comment. This comment language indicates that the entirety of a property interest that secures any debt instruments must be sold together with any such debt instruments in a single transaction to constitute a unit.

Defendants contend that the proper interpretation of the Exemption's statutory language is that one note, or debt instrument, sold and secured by one deed of trust, constitutes a unit regardless of whether future debt instrument transactions are secured by the same property interest. The Court finds that this interpretation is contrary to the plain language of the statute and the very purpose of the Act. If the Defendants' interpretation were to be accepted, then the second half of the Exemption's language would serve no purpose at all. Instead, the Legislature has chosen to include an express requirement that a debt instrument secured by a property

interest only be exempt where the entirety of the property interest "together with all" other evidences of indebtedness secured by such property interest is offered and sold together in one transaction. Accordingly, the Exemption only applies to a single transaction wherein all debt instruments collateralized by a single property interest are offered and sold together. As long as this requirement is met, it does not matter to whom the debt instruments are sold.

This interpretation lends itself to a consistent, harmonious, and sensible result. As discussed above, the Act was enacted in order to protect investors and avoid unreasonable burdens on the market. By construing the language in the Exemption narrowly and limiting its application only to a single transaction wherein all debt instruments collateralized by a single property interest are offered and sold together, potential injustice and unfairness is avoided.

This interpretation requires that debt instruments collateralized by the same property interest, which are sold in multiple separate and distinct transactions, be registered. This registration requirement protects investors and maintains public confidence in securities markets by ensuring that investors are apprised of any potential dilution of property interests collateralizing debt instruments, and properly informed of their actual lien position in the case of the seller's default. To shelter such transactions from registration requirements would potentially lead to a situation where investors' debt instruments are collateralized by an interest which can be consistently fractionalized without any guarantee that investors will be apprised of such fractionalization.

B. The Defendants' Conduct does not fall within the Exemption

The undisputed material facts show that the Defendants received three separate investments in three separate transactions from two different investors, which were collateralized by the Yampa Property. First, on April 5, 2013, SFG provided Defendants with a private loan in the amount of $65,000. On the same date, Defendant Roop, in his capacity as trustee of the

Yampa Property Trust, executed a promissory note and deed of trust to SFG as collateral for the private loan. Next, in September 2013, Defendants received two separate investments from Mr. Eric Wales totaling $25,000. On September 25, 2013, Defendant Roop, individually and in his capacity as trustee for the Yampa Property Trust, executed two promissory notes and deeds of trust naming the Yampa Property as collateral for each of Mr. Wales' private loans.

Based on these undisputed facts, the Court finds that these promissory notes were not sold in a single transaction with all debt instruments collateralized by the Yampa Property. Consequently, these debt instruments and the entirety of the corresponding property interest were not offered and sold as a unit. Thus, the exemption does not apply here.

Further, Defendants have admitted that the promissory notes in question are securities under the Act. Additionally, Defendants have admitted that the promissory notes they provided to investors were not registered with the Commissioner, nor was a notice of exemption filed, at the time of execution. Accordingly, the undisputed facts show that Defendants have offered and sold unregistered securities in violation of C.R.S. § 11-51-301.

Therefore, the Court GRANTS the Commissioner's Motion and DENIES Defendants' Cross-Motion on Plaintiff's First Claim for Relief.

II. Defendants have Acted as an Unlicensed Broker-Dealer and Sales Representative in Violation of C.R.S. § 11-51-401

The Commissioner alleges in his Motion that Defendants have transacted business in Colorado as a broker-dealer and sales representative without a license, in violation of C.R.S. § 11-51-401(1) and (2). In support of this claim, the Commissioner contends that despite the revocation of Defendants' broker-dealer and sales representative licenses, the undisputed facts

show that BLR is acting as a mortgage broker-dealer or issuer and is employing Defendant Roop as an unlicensed mortgage sales representative.

Defendants respond that BLR is not a broker-dealer under the Act because it is not "engaged in the business of effecting purchases or sales of securities *for the accounts of others*." Colo. Rev. Stat. § 11-51-201. Specifically, Defendants contend that the determination of whether an entity is a "broker" turns on the existence of a transaction-compensation scheme. According to Defendants, because BLR did not receive any compensation from Defendant Roop and because the investments were sold for BLR's own benefit, BLR cannot be considered a broker-dealer under the Act.

Additionally, according to Defendants, BLR is not a broker-dealer because land trusts are not separate "persons." To support this argument, Defendants argue that BLR was the beneficiary of the land trusts with the power to avail itself of proceeds of any loans made in the name of trust, collect all income from the property, and direct the trustee to execute notes and security instruments on behalf of the trust. Defendants claim that BLR was the "issuer" of the securities and directed Defendant Roop to execute notes and security instruments in the name of the title-holding trust for each property on behalf of the BLR, the issuer. Therefore, Defendants contend that because the land trusts used by BLR to title properties are merely arrangements of convenience, and not separate persons or entities on behalf of which the Defendants brokered securities, the Defendants did not offer securities for anyone other than BLR. Thus, Defendants claim BLR is exempt from the broker-dealer statute.

A. BLR has transacted business in Colorado as an Unlicensed Broker-Dealer in Violation of C.R.S. § 11-51-401(1)

"A person shall not transact business in this state as a broker-dealer or sales representative unless licensed or exempt from licensing under section 11-51-402." Colo. Rev.

Stat. § 11-51-401(1) (2014). "'Broker-dealer' means a person engaged in the business of effecting purchases or sales of securities for the accounts of others or in the business of purchasing and selling securities for the person's own account." Colo. Rev. Stat. § 11-51-201(2) (2014).

Transaction-based compensation is indicative of whether one is a broker-dealer because such compensation is triggered by effecting a sale. *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 734 (Colo. App. 2009) (citing *Herbruck, Alder & Co.*, SEC No–Action Letter, 2002 WL 1290291, at *2 (June 4, 2002)). "Individuals who solicit investors by phone and in person, and who distribute documents and prepare and distribute sales circulars in the hope that potential investors will deposit money in the account, are seeking to effect securities transactions." *Id.* (citing *SEC v. Deyon*, 977 F. Supp. 510, 518 (D. Me. 1997)). "Effecting transactions in securities is shown by actively soliciting clients, selling securities to the clients, and participating in securities transactions 'at key points in the chain of distribution.'" *Id.* (quoting *SEC v. Nat'l Executive Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980)).

There is no dispute that the promissory notes in question are securities under the Act. There is also no dispute that the Commissioner revoked BLR's broker-dealer licensure on December 18, 2012. BLR has admitted that its business involves offering promissory notes to investors at a set rate of return in order to fund the purchase, sale, and financing of residential real estate. It is further undisputed that BLR solicits investors and distributes documents and sales circulars in hope that potential investors will invest with BLR.

Moreover, the transactions underlying the Yampa Property indicate that BLR sells securities to clients and participates in the securities transactions at key points in the chain of distribution. In the Yampa Property investment transactions BLR solicited investors and received

monetary investments as a result of these solicitations. BLR then created the Yampa Property Trust and facilitated the execution of promissory notes from the Yampa Property Trust to investors. These undisputed facts show that BLR was facilitating all aspects of the investment including the issuance of securities to investors on behalf of its own account. For these reasons, the Court finds that BLR was acting as an unlicensed broker-dealer in violation of C.R.S. § 11-51-401(1).

B. Defendant Roop has transacted business in Colorado as an Unlicensed Sales Representative in Violation of C.R.S. § 11-51-401

> '**Sales representative**' means an individual, other than a broker-dealer, either authorized to act and acting for a broker-dealer in effecting or attempting to effect purchases or sales of securities or authorized to act and acting for an issuer in effecting or attempting to effect purchases or sales of the issuer's own securities. An individual so acting for an issuer is not a sales representative if the individual primarily performs, or is intended primarily to perform upon completion of an offering of the issuer's own securities, substantial duties for or on behalf of the issuer otherwise than in connection with transactions in the issuer's own securities and the individual's compensation is not based, in whole or in part, upon the amount of purchases or sales of the issuer's own securities effected for the issuer. A partner, officer, or director of a broker-dealer or issuer, or an individual occupying a similar status or performing similar functions, is a sales representative only if the individual otherwise comes within the definition.

Colo. Rev. Stat. § 11-51-201(14) (2014). "Neither a broker-dealer nor an issuer shall employ or otherwise engage an individual to act as a sales representative in this state unless the sales representative is licensed or exempt from licensing under section 11-51-402." Colo. Rev. Stat. § 11-51-401 (2) (2014).

It is undisputed that the Commissioner revoked Defendant Roop's licensure as a mortgage sales representative effective December 18, 2012. Further, the undisputed facts show that Defendant Roop is authorized to act and has acted for BLR, a broker-dealer under the Act, to

effect purchases and sales of BLR's securities. Such conduct is exemplified in the Yampa Property transactions wherein Defendant Roop repeatedly executed promissory notes and deeds of trusts in his capacity as President of BLR. Through these transactions Defendant Roop executed debt instruments and collateralized such debt with securities on BLR's behalf. Additionally, the Defendants' marketing materials as well as the promissory notes and deeds of trust executed by Defendant Roop in the Yampa Property transactions indicate that the sale of BLR's securities is part of Defendant Roop's primary duties. Accordingly, Defendant Roop has acted as an unlicensed sales representative in violation of C.R.S. § 11-51-401(2).

Therefore, the Court GRANTS the Commissioner's Motion and DENIES Defendants' Cross-Motion on Plaintiff's Second Claim for Relief.

III. A Permanent Injunction is an Appropriate Remedy Under C.R.S. § 11-51-602

The Commissioner asserts that the appropriate remedy in this case is a permanent injunction. The Commissioner contends that because the Defendants continue to engage in actual offers and sales of unregistered securities and continue to engage in unlicensed broker-dealer and sales representative activity, a permanent injunction should be entered by the Court.

> Upon sufficient evidence satisfactory to the securities commissioner that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this article or of any rule or order under this article, the securities commissioner may apply to the district court of the city and county of Denver to temporarily restrain or preliminarily or permanently enjoin the act or practice in question and to enforce compliance with this article or any rule or order under this article.

Colo. Rev. Stat. § 11-51-602(1) (2014). In order to successfully apply for a permanent injunction, the Commissioner must show: "(1) that a past or threatened future violation of the [Act] exists, (2) that the injunction would not disserve the public interest, and (3) that the public interest favors the injunction." *Joseph v. Equity Edge, LLC,* 192 P.3d 573, 577 (Colo. App. 2008)

(citing Colo. Rev. Stat. § 11-51-602(1); *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508, 518-19 (Colo. App. 2004); *Kourlis v. District Court*, 930 P.2d 1329, 1335 (Colo. 1997); *Joseph v. Viatica Mgmt., LLC*, 55 P.3d 264, 268 (Colo. App. 2002)). The district court's discretion in reviewing for injunctive relief under the Act is narrower than that permitted by C.R.C.P. 65 and related common law tests for injunctive relief. *Id.* Specifically, the Commissioner is not required to plead or prove irreparable injury or inadequacy of the remedy at law. *Id.*

Here, the Court has determined that Defendants have violated C.R.S. § 11-51-401(1) and (2) as well as C.R.S. § 11-51-301. Accordingly, part one of the injunctive test—a past violation of the Act—has been established. "Compliance with the [Act] is necessarily in the public interest. The passage of such laws by the legislature establishes the public interest underlying such provisions." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 738 (Colo. App. 2009). Therefore, the Court finds that a permanent injunction would not disserve the public interest and that the public interest in fact favors such an injunction.

For these reasons, the Court GRANTS the Commissioner's request for a Permanent Injunction and reserves further damages for trial.

CONCLUSION

WHEREFORE, in light of the reasoning stated above, Plaintiff's Motion for Partial Summary Judgment is GRANTED and Defendant's Cross-Motion for Summary Judgment is DENIED as to Plaintiff's First and Second Claims for Relief. Additionally, the Court hereby GRANTS the Commissioner's request for a Permanent Injunction and reserves further damages for trial.

DONE this 5th Day of March 2015.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge